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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

No.

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

79-1859

VS.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals (App. A to Petition), affirming the decision of the District Court (App. D to Petition), is reported at 616 F.2d 394.

STATUTES INVOLVED

Section 16 of the Clayton Act (15 U.S.C. § 26) and § 1981 of the Judicial Code (28 U.S.C. § 1981).

QUESTIONS PRESENTED

1. As this Court, the Ninth and Seventh Circuit Courts of Appeal, the District Courts of Oregon and Illinois and the Interstate Commerce Commission have all recognized, Greyhound pursued a deliberate program to destroy Mt.

Hood throughout the 1950's and 1960's.[1] Greyhound's cancellation of the joint through bus and severance of connections with Mt. Hood in July 1964 was the culmination of this destructive campaign. Title 15 U.S.C. § 26 prohibited Mt. Hood from seeking an injunction in the District Court against Greyhound's predatory behavior. Moreover, in 1964, the doctrine of primary jurisdiction as enunciated by this Court and the Ninth Circuit would have required a District Court to dismiss an action for damages pending disposition by the ICC of Mt. Hood's claims against Greyhound:

Was the statute of limitations properly tolled pursuant to the doctrine of equitable tolling when Mt. Hood commenced its action before the ICC (a) to prevent Greyhound's predatory conduct and (b) to invoke the ICC's primary jurisdiction to determine whether Greyhound's predatory conduct was approved and therefore exempt from the antitrust laws or was disapproved and therefore subject to the antitrust laws?

2. This Court has declared that a federal statute of limitations should be tolled if it will promote important

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[1] *Mt. Hood Stages, Inc., Petition for Modification—Greyhound Mergers* (Western Mergers), 104 MCC 449, 464 (1968); *Greyhound Lines, Inc. v. United States,* 301 F.Supp. 356 (N.D. Ill. 1969); *Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1033 (N.D. Ill. 1970); *United States v. The Greyhound Corporation,* 363 F.Supp. 525 (N.D. Ill. 1973); *The Greyhound Corp. v. United States,* 370 F.Supp. 881 (N.D. Ill. 1974); *United States v. The Greyhound Corp.,* 508 F.2d 529 (7th Cir. 1974); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1973-2 CCH Trade Cases, ¶ 74,824 (D. Ore. 1973); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 437 U.S. 322 (1978); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1979-1 CCH Trade Cases, ¶ 62,446 (D. Ore. 1979); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 616 F.2d 394 (9th Cir. 1980) (App. A).

federal policies without frustrating the statute of limitations' policy of repose. Hence in every case in which equitable tolling has been invoked, the court sitting as chancellor—not a jury—decided whether equitable tolling should apply in accordance with this Court's standard:

Was it constitutionally proper for the lower court—rather than a jury—to decide the equitable tolling question?

3. The original judgment was entered on a jury verdict in May 1973. [R. 2248-9] Approximately one-third of that judgment depended upon tolling the statute of limitations as a result of (a) Greyhound's fraudulent concealment of its violations from 1953 to 1960 and (b) application of § 5(i) of the Clayton Act. In June 1978, this Court held that § 5(i) was not applicable but left intact that portion of the judgment for damages which accrued within the limitations period. This Court remanded the case for consideration of Mt. Hood's alternative equitable tolling claim. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 337 n. 21 (1978). On remand, the original judgment was reinstated in its entirety [R. 3570-71]:

Was the Court of Appeals correct in holding that Mt. Hood was entitled to recover interest from the date the original judgment was entered in May 1973?

4. Title 28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." Section 4 of the Clayton Act (15 U.S.C. § 15) provides that a successful antitrust plaintiff shall recover "the costs of suit including a reasonable attorney's fee." Pursuant to those statutes, the District Court entered an amended judgment in December 1973, incorporating

the amount of the jury verdict and a reasonable attorney's fee [R. 3271-3]:

Is Mt. Hood entitled to interest on the entire "money judgment," including that portion of the judgment consisting of attorney's fees, as provided by law?

STATEMENT OF THE CASE

During the period 1947-54, Greyhound acquired control of eight bus companies which operated in the Pacific Northwest and had routes connecting with Mt. Hood. Mt. Hood protested those acquisitions in the Interstate Commerce Commission ("ICC") because Mt. Hood feared that if the acquisitions were approved, Greyhound could "longhaul" passengers around Mt. Hood's shorter bridge routes so as to deprive the public of the most convenient service and cause serious harm to Mt. Hood. In response to Mt. Hood's protests, Greyhound's top executives assured the ICC under oath that Greyhound would not longhaul passengers over its circuitous routes; that Greyhound would quote Mt. Hood's direct service and publish Mt. Hood's schedules in its folders; and that Greyhound would continue the joint through bus arrangement with Mt. Hood.[2] The Court of Appeals described what happened thereafter:

> "Relying upon Greyhound's representations, the Commission approved the acquisitions. After encircling Mt. Hood, Greyhound with the purpose of driving Mt. Hood out of business, did exactly what it represented to the Commission it would not do: Greyhound cancelled the through-bus connection, scheduled connecting services to preclude reasonable connection

[2] *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968), quoted in this Court's opinion, *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 325-26 (1978).

> with Mt. Hood, caused ticket agents to direct traffic over Greyhound's longer routes, and interfered with the distribution of Mt. Hood's schedules and the quotation of its rates and services." (App. A, p. 5)

Contrary to its assurances to the ICC, Greyhound broke connections with Mt. Hood on July 6, 1964. Because Mt. Hood was then surrounded by Greyhound and thus substantially dependent upon Greyhound for passengers, Greyhound's actions threatened imminent destruction of Mt. Hood's business. On October 7, 1964, after Greyhound had refused Mt. Hood's pleas to restore connections, Mt. Hood petitioned the ICC for injunctive relief.[3] The Antitrust Division of the Department of Justice intervened "to ensure the adequate consideration of the antitrust issues" raised by Mt. Hood's petition. [R. 1374] Following a trial in 1966-67, the ICC (Division Three) on April 5, 1968, affirmed the Hearing Examiner's report that Greyhound's practices constituted "destructive competition," were "not consistent with the public interest," were "inconsistent with the representations made in various [acquisition] proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy Mt. Hood." *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63.

Promptly thereafter, on July 5, 1968, Mt. Hood commenced this action for damages.[4] [R. 1] As this Court and

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[3]Mt. Hood was precluded from seeking injunctive relief under the antitrust laws in a federal district court by reason of 15 U.S.C. § 26.

[4]While Mt. Hood was prosecuting this action, Greyhound was resisting the ICC's cease and desist orders. A three-judge District Court in Chicago affirmed the ICC's orders and granted the government's request for an injunction prohibiting Greyhound from continuing its predatory behavior. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033 (N.D. Ill. 1970). Nonetheless, Greyhound

the Court of Appeals observed previously, the allegations in Mt. Hood's antitrust complaint and its ICC petition were essentially the same. 437 U.S. at 326-7:

> "Both claims rested upon the same conduct: [Greyhound's] acquiring encircling routes, canceling the joint through-bus and directing passengers over Greyhound's circuitous routes rather than Mt. Hood's direct route, all with the purpose and effect of eliminating Mt. Hood as a competitor." (App. A, p. 12)

On May 2, 1973, following a five week trial, the jury found that Greyhound's conduct violated §§ 1 and 2 of the Sherman Act and that Mt. Hood had sustained damages of $4,382,030 during the period January 1, 1953 to March 25, 1973. [R. 2248-49]

Prior to trial, the District Court ruled that § 5(i) of the Clayton Act (15 U.S.C. § 16(i)) had tolled the period of limitations from December 14, 1964, the date the Department of Justice intervened in the ICC proceeding. [R. 1354-57] After trial, on the basis of special interrogatories posed to the jury, the District Court also held the statute of limitations had been tolled during the period January 1, 1953 to December 15, 1960 by reason of Greyhound's fraudulent concealment of its antitrust violations. [R. 2248-49] Thus Mt. Hood was permitted to recover damages sustained during the entire period of Greyhound's unlawful conduct.

"displayed a contemptuous reluctance to even commence compliance with the Court's order" and in June, 1973, the District Court in Chicago found Greyhound guilty of criminal and civil contempt for willful disobedience of the court's order. *United States v. Greyhound Corp.*, 363 F.Supp. 525, (N.D. Ill. 1973); 370 F.Supp. 881, 884 (N.D. Ill. 1973). The District Court's judgment was affirmed by the Seventh Circuit. *United States v. The Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974)

In opposition to Greyhound's motion for judgment NOV and for a new trial, Mt. Hood contended the doctrine of equitable tolling—in addition to § 5(i)—suspended the statute of limitations while Mt. Hood was prosecuting its claims against Greyhound before the ICC. [R. 2653-59] In denying Greyhound's motions, the District Court did not address the equitable tolling issue. [R. 2874-81] On appeal, the Ninth Circuit did not reach Mt. Hood's equitable tolling claim either since § 5(i) was deemed sufficient to toll the statute. *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 701, n. 34 (9th Cir. 1977). Greyhound petitioned for certiorari and, with reference to equitable tolling, specifically requested this Court to "grant certiorari to afford the matter full consideration." (Reply Brief in Support of Petition for Writ of Certiorari, at p. 10) This Court granted certiorari and held that § 5(i) was not applicable, but declined to consider the equitable tolling issue: "[W]e see no compulsion—indeed, no justification—for our reaching this distinct issue." 437 U.S. at 337 n. 21.

On remand, the trial judge invited the parties to supplement the trial record with evidence relevant to the equitable tolling issue and requested that counsel make offers of proof. [R. 3342] Except for the conclusory declarations of two Greyhound lawyers speculating how they might have employed a different strategy in their defense of the ICC and court litigation, Greyhound made no such offers of proof. [R. 3392, 3396] Nor did Greyhound demand the issue be resolved by a jury. The trial judge was "satisfied that the record presently before [it] is adequate to answer any factual questions that remain to be decided in the equitable tolling issue" [R. 3469], "reviewed parts of the

transcript with some care" [R. 3470] and resolved that issue in favor of Mt. Hood. [R. 3563-9] A third amended judgment was entered in the same amount as the original judgment with interest on attorney's fees from the date they were awarded. [R. 3570-71] The District Court also denied Greyhound's second motion for a new trial. [R. 3569][5]

Acknowledging the long delay in the resolution of this action, the Court of Appeals heard oral argument after an expedited briefing schedule in May, 1979. Although only two questions had been remanded by the Court of Appeals for decision by the District Court [R. 3334-5], Greyhound raised five issues in the Court of Appeals. Chief Judge Browning and Circuit Judges Wright and Kennedy unanimously affirmed the trial judge in all respects. Greyhound now petitions this Court for a second writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION PROPERLY APPLIED THE EQUITABLE DOCTRINE OF TOLLING AS DEFINED BY THIS COURT

The Court of Appeals' decision—unanimously affirming the District Court's application of equitable tolling to the particular facts here—rests solidly upon Supreme Court precedent. This Court has recognized on several occasions that a statute of limitations should be tolled on equitable grounds if important federal policies will be

[5]Greyhound's first motion for a new trial was filed in 1973 and denied by the trial court [CT 2256-60; 2880]. That denial was affirmed on appeal. 555 F.2d 687. Certiorari was not sought on this issue in Greyhound's earlier petition to this Court, nor is it being sought now.

served without frustrating the statute of limitations' policy of repose. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 427 (1965), the seminal decision on this subject, prescribed the standard for the lower courts to follow in determining whether equitable tolling should apply: the courts must consider "the purposes and policies underlying the limitations provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act." Applying the *Burnett* standard, this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556 (1974) held that an improper class action nonetheless tolled the statute of limitations for all purported class members because tolling fostered "efficiency and economy of litigation" in the federal courts. While tolling was denied in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975), this Court there declared the statute of limitations should be tolled whenever there is "a substantial body of relevant procedural law to guide the decision" and "a significant underlying federal policy that would have conflicted with a decision not to suspend the statute."

Both courts below applied the Supreme Court standard and found that, on the discrete facts of this case, tolling should apply. In accordance with *Burnett, American Pipe* and *Johnson*, the Court of Appeals carefully analyzed the "remedial scheme" developed by Congress and the Supreme Court for the orderly enforcement of the antitrust laws against carriers regulated by the Interstate Commerce Commission. That analysis revealed precisely what this Court in *Johnson* declared was a prerequisite to equitable tolling: "a substantial body of federal procedural law to

guide the decision" and "a significant underlying federal policy that would have conflicted with the decision not to suspend the statute." (421 U.S. at 466) That "federal procedural law" and "federal policy" deemed so important in *Johnson* are embodied in § 16 of the Clayton Act (15 U.S.C. § 26) and the Supreme Court doctrine of primary jurisdiction.

When Greyhound severed connections with Mt. Hood on July 6, 1964, threatening Mt. Hood with the destruction of its business, Mt. Hood had no choice of forum. It had to go to the ICC. It could not go to the District Court. As a matter of law, prior resort to the ICC was (1) essential to the preservation of Mt. Hood's business from destruction by Greyhound and (2) a condition precedent to the maintenance of Mt. Hood's subsequent court action for restitution. *First*: Section 16 of the Clayton Act prohibited Mt. Hood from obtaining a federal court injunction against Greyhound's antitrust violations.[6] The Court of Appeals recognized that "Mt. Hood could secure an order restraining Greyhound's predatory practices *only* by petitioning the ICC, as it did." (App. A, p. 9) *Second*: The doctrine of primary jurisdiction as enunciated by this Court and the Ninth Circuit in 1964—the year Mt. Hood had to act to preserve its business from destruction and preserve its damage claim from the limitations bar—mandated that a simultaneous damage action be dismissed. *Far East Con-*

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[6]The policy behind that statutory prohibition was stated by this Court in *Central Transfer Co. v. Terminal R. Assoc.*, 288 U.S. 469, 475 (1933): "Its obvious purpose is to preclude any interference by [court] injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission."

ference v. United States, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964), reversed, 383 U.S. 213 (1966).

Surely the statute of limitations should not run on an action that would be dismissed if brought. Yet that is the gravamen of Greyhound's petition for certiorari. A complaint for injunctive relief against Greyhound certainly would have been dismissed pursuant to 15 U.S.C. § 26. A complaint for damages against Greyhound, just as certainly, would have been dismissed pursuant to the doctrine of primary jurisdiction. In 1964, relying upon this Court's decisions in *Cunard* and *Far East*, the Ninth Circuit affirmed the dismissal of plaintiff's antitrust damage action pending agency determination of matters within its primary jurisdiction so as to avoid conflict between the regulatory and antitrust regimes. *Carnation, supra*, 336 F.2d 650.[7] In plain terms, the Ninth Circuit ruled the District Court "was without jurisdiction to proceed." 336 F.2d at 653 and 667 n. 32. See, *Segal v. A.T.&T.*, 606 F.2d 842, 845 (9th Cir. 1979). By commencing its ICC action in 1964 and not commencing a simultaneous damage action, Mt. Hood acted in accordance with governing law.

This twelve-year old case does not warrant another review by the Supreme Court. The Court of Appeals' deci-

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[7]See *Cunard, supra*, 284 U.S. at 481 ("a remedy *must* be sought from the commission *before* the jurisdiction of the courts could be invoked."); *Far East, supra*, 342 U.S. at 574 (agency had "*exclusive* preliminary jurisdiction" of the matter); *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 292 (1922) ("The preliminary determination *must* be made by the Commission; and not *until* this determination has been made can a court take jurisdiction of the controversy.") Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (administrative remedies must be exhausted prior to resort to the courts for judicial relief) (emphases added).

sion conscientiously applied this Court's equitable tolling precedents to the historical facts presented here. The ICC action adhered to the "remedial scheme developed for the enforcement of rights" as prescribed by *Burnett*. It promoted "litigative efficiency and economy" as certainly as did the improper class action in *American Pipe*. It complied with "the substantial body of relevant procedural law" deemed so important in *Johnson*. Greyhound might disagree with the lower court's exercise of its equity jurisdiction by applying the equitable doctrine of tolling to the particular facts presented to it.[8] But that cannot justify a writ of certiorari.

A. The Court of Appeals' Decision Accords With Johnson v. Railway Express Agency

Johnson recognized that a statute of limitations would be tolled by agency proceedings if some "body of federal procedural law" or "significant federal policy" would be served thereby. (421 U.S. at 466) Tolling was denied in *Johnson* because those considerations—clearly present here —were absent there. In *Johnson*, commencement and prosecution of an EEOC proceeding under Title VII "[were] not prerequisities for the institution of a § 1981 action." (421 U.S. at 460) Here, by virtue of primary jurisdiction law as it stood in 1964, Mt. Hood had to obtain favorable ICC rulings as a "prerequisite" to its later damage action.[9] In

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[8]As Chief Justice Burger declared on Greyhound's prior appeal: "The authority of a federal court, sitting as chancellor, to toll a statute of limitations on equitable grounds is a well established part of our jurisprudence." 437 U.S. at 338.

[9]See f.n. 7, *supra*. See Court's discussion in *Board of Regents v. Tomanio*, .. U.S. .. (decided May 19, 1980); see also *Pesola v. Inland Tool & Mfg., Inc.*, 423 F.Supp. 30, 32 n. 2 (E.D. Mich. 1976) (distinguishing *Johnson* and tolling a statute of limitations

Johnson, as this Court stressed repeatedly, Congress had conferred upon plaintiff a "valuable" choice between "separate, distinct and independent remedies." (421 U.S. at 460-61) Here, the ICC proceedings and the subsequent court action were not "independent" of each other but were, by virtue of primary jurisdiction law, clearly interdependent.[10] In *Johnson*, this Court observed the absence of a "positive preference" that plaintiff's Title VII administrative remedy be pursued before the commencement of his § 1981 remedy. (421 U.S. at 461) Here, the doctrine of primary jurisdiction evinced not merely a "positive preference" but a plain mandate that Mt. Hood obtain ICC rulings before prosecuting its damage action in federal court.

The Court of Appeals carefully measured the facts of this case against the *Johnson* yardstick and concluded that the requisites for tolling, absent in *Johnson*, were present here:

> "Clearly, Congress did not intend a suit under the antitrust laws to be an independent remedial alternative to a petition to the Commission under § 10 of the Interstate Commerce Act in the circumstances involved here. No injunction could have issued and no damages could have been awarded under the antitrust laws unless and until the Commission exercised its primary jurisdiction under the Interstate Commerce Act. The

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when union grievance procedure was "a *prerequisite* to the cause of action to be preserved by tolling."); *Strickland v. Johns-Manville International Corp.*, 461 F.Supp. 215, 218 (S.D. Tex. 1978).

[10]See *U.S. v. Western Pacific R. Co.*, 352 U.S. 59, 64 (1956) (facts determined by the ICC "serve as a premise for legal consequences to be judicially defined"). This interdependence was particularly evident here. The Court of Appeals repeatedly declared the ICC's prior disapproval of Greyhound's predatory conduct was "key to our determination that Greyhound's conduct was not immune from the antitrust laws." App. A, p. 13; 555 F.2d at 699.

> doctrine of primary jurisdiction provides the 'relevant federal procedural law to guide the decision to toll the limitations period'. The significant federal policy underlying that doctrine—affording the Commission an opportunity to discharge its functions in the area assigned to it for regulation without interference by courts exercising related jurisdiction under the antitrust laws—'would have conflicted with a decision not to suspend the running' of limitations." (App. A, p. 17)

The Court of Appeals also properly found that the statute of limitations' policy of repose was not frustrated. Greyhound could not assert that evidence was "lost" inasmuch as Greyhound fraudulently concealed its violations until 1964 [R.2248-9] and has been litigating those violations ever since. See *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). The Court of Appeals correctly found that both the factual and legal issues raised by the ICC action "provided Greyhound with notice of Mt. Hood's antitrust claims in all but the most technical sense." (App. A, p. 12). As this Court and the Court of Appeals recognized, both proceedings involved precisely the same factual allegations. 437 U.S. at 326; 555 F.2d at 691; App. A, p. 12. Similarly, both proceedings applied the antitrust laws to that conduct. The ICC informed Greyhound that "the antitrust laws . . . offer certain broad guidelines in determining this proceeding." 104 MCC 449 at 451.[11] The Court of Appeals likewise declared that

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[11]The ICC's obligation was particularly compelling here because 15 U.S.C. § 26 prohibited Mt. Hood from obtaining injunctive relief in a District Court. That prohibition, this Court held in *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 502 (1967), "underscores the ICC's responsibility to act when such [antitrust] violations are brought to its attention."

"antitrust issues were an appropriate part of the proceedings." 555 F.2d at 701. Indeed, Greyhound acknowledged the Justice Department intervened in the ICC action "to assure the adequate consideration of antitrust issues" [R. 1374], including the issue of antitrust immunity. [R. 2272] Hence, as the Court of Appeals recognized, Mt. Hood's ICC action for injunctive relief and its later court action for damages were essentially identical so as "to avoid the evil against which the statute of limitations was designed to protect." *Johnson, supra*, 421 U.S. at 467; see App. A, pp. 12-18.

B. The Court of Appeals' Decision Presents No Conflict With Decisions of the Second Circuit

The lower court's exercise of its equity powers to toll the statute of limitations here does not conflict with the decisions of the Second Circuit or any other Circuit Court of Appeals. The lower court's decision, like the Second Circuit decisions cited by Greyhound, merely represent the discrete application of equitable principles to the particular facts presented. Following this Court's remand, the Court of Appeals remanded to the District Court because application of equitable tolling "turns in large part upon questions of fact" and therefore initial review by the "trial judge fully familiar with the facts" was necessary. [R. 3334-5] Both the District Court (Circuit Judge Goodwin sitting by designation) and the Court of Appeals painstakingly weighed the facts and applied this Court's equitable tolling standards to those facts. The Second Circuit did no more.[12]

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[12]In *Meyer v. Frank*, 550 F.2d 726 (2nd Cir. 1977), *cert. denied*, 434 U.S. 830 (1977), the Court twice stated that its decision rested upon the facts and circumstances presented and proceeded to strike

That another court might decline to apply equitable tolling to the particular facts before it is of no possible significance here. What is significant is that numerous courts (the Second Circuit as well as other Courts of Appeal and District Courts) have frequently exercised their equity powers to suspend the statute of limitations "where the interests of justice require[d] vindication of plaintiff's rights." *Burnett, supra,* 380 U.S. at 428.[13] Chief Justice Burger recognized that the equitable tolling issue was for the lower court "sitting as a chancellor." 437 U.S. at 338-9. That the "chancellor" might exercise its equity discretion to toll or not toll the statute in any particular instance does not warrant review by this Court.[14]

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a balance between the policies of federalism and repose in light of plaintiff's conduct. 550 F.2d at 727 and 729-30. Although tolling was denied in *Williams v. Walsh*, 558 F.2d 667 (2nd Cir. 1977), the Court took pains to declare that "tolling may sometimes be necessary to prevent frustration of the policy of the substantive federal statute or, perhaps to advance the goals of federalism." 558 F.2d at 674. *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2nd Cir. 1978) similarly acknowledged that tolling is appropriate where, as here (due to 15 U.S.C. § 26 and the doctrine of primary jurisdiction), "plaintiff has in some extraordinary way been prevented from asserting his rights." 571 F.2d at 109.

[13]See, e.g., *Leigh v. McGuire*, 613 F.2d 380 (2nd Cir. 1979); *Billings v. Chicago, R.I. & P.R. Co.*, 581 F.2d 707 (8th Cir. 1978); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381, 392 (10th Cir. 1977) (en banc); *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), aff'd by equally divided court, 434 U.S. 99 (1977); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); *Pesola, supra,* 423 F.Supp. 34.

[14]Moreover, the scope of appellate review on the equitable tolling issue is necessarily limited. Appellate courts will not disturb the findings of fact of a trial judge sitting in equity unless those findings of fact are "clearly erroneous." *United States v. E.I. duPont De Nemours & Co.*, 331 U.S. 377, 381 (1956)

C. The Court of Appeals' Decision Is Not in Conflict With Carnation Co. v. Pacific Westbound Conference

In looking to *Burnett, American Pipe* and *Johnson* for guidance with respect to the doctrine of equitable tolling, the Court of Appeals acted correctly. Those decisions represent the paramount authority on this issue. On the other hand, as the Court of Appeals ascertained from a search of this Court's records, the tolling issue was not before the Court in *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966): "Neither limitations nor tolling was mentioned in the petition for certiorari, the opposition or the briefs on the merits." (App. A, p. 20) While this Court ruled in *Carnation* that antitrust damage actions generally are subject to the statute of limitations and should therefore be stayed rather than dismissed pending agency rulings on matters within the agency's primary jurisdiction, it clearly did not decide—and was not asked to decide—whether and under what circumstances a court might toll the limitations statute pursuant to equitable principles.

Carnation is not only of no help to Greyhound; it further demonstrates why this case does not present a significant issue worthy of a second review by this Court. Mt. Hood had to act in 1964. The law which governed its actions then was stated in *Cunard, Far East, Great Northern* and the Ninth Circuit's decision in *Carnation.* The passing reference to the limitations statute in this Court's decision in *Carnation* did not come until two years later—1966—long after the fact. In applying equitable tolling, the lower courts properly judged the reasonableness of Mt. Hood's conduct by the law which governed it. It would not have been fair to do otherwise.

Mt. Hood was told in 1964 that the doors of the federal courts were closed to its claim for damages. *Carnation, supra,* 336 F.2d at 650, 653. See also *Segal v. A.T.&T.,* 606 F.2d 842, 845 (9th Cir. 1979) ("The law of our Circuit [in 1964] required the district court to dismiss an action within the primary jurisdiction of an agency rather than to retain jurisdiction over it.") This Court should not grant certiorari to consider Greyhound's contention that the statute of limitations ran on a damage action that would have been dismissed if brought. Nor should certiorari be granted to consider Greyhound's claim that Mt. Hood should have foreseen a change in the law two years later.

D. Greyhound's Other Contentions Do Not Warrant Review By This Court

Greyhound asserts that Mt. Hood proceeded "backwards" by going to the ICC first and that application of equitable tolling to Mt. Hood's ICC action therefore "frustrates" the doctrine of primary jurisdiction. This claim is likewise undeserving of the Court's review. In 1964, when Mt. Hood was at the brink of destruction by Greyhound, the "remedial scheme" reflected in 15 U.S.C. § 26 and the doctrine of primary jurisdiction literally barred Mt. Hood's access to the District Court. See *Segal, supra,* 606 F.2d at 845. For Mt. Hood to have sought help from the only forum then open to it was not to proceed "backwards". Greyhound surmises that its antitrust immunity claim would have been resolved by the lower courts more expeditiously had Mt. Hood requested the District Court to refer specific antitrust issues to the

ICC for consideration. But the lower courts' decisions proved the contrary. Both the District Court and the Court of Appeals relied heavily upon the ICC's disapproval of Greyhound's conduct as "destructive competition" in rejecting Greyhound's claim of antitrust immunity. It is thus frivolous of Greyhound to assert that "the ICC was never even asked the question it should have answered to help the antitrust court do its job." (Petition at p. 17) Chief Judge Browning declared in Greyhound's prior appeal: "The successful resolution of these issues [by the ICC] was critical to the defeat of Greyhound's claim of antitrust immunity." 555 F.2d at 699. Contrary to Greyhound's accusation, the ICC furnished the lower court precisely what it needed "to help the antitrust court do its job." See *Western Pacific, supra,* 352 U.S. at 64. That Greyhound doggedly litigated its antitrust immunity claim "for nearly 10 years" thereafter cannot be blamed upon Mt. Hood's prior resort to the ICC. It was due to Greyhound's tenacity alone.

Finally, Greyhound's alarmist cry that "confusion" will result from the application of tolling here should be disregarded. If Greyhound is suggesting that a trial judge sitting in equity lacks discretion to toll a statute of limitations in "the interests of justice" (*Burnett,* 380 U.S. at 428), it is wrong. The broad equity discretion vested in the trial judge cannot be denied. *Burnett, supra; American Pipe, supra,* 414 U.S. at 559 (reiterating "the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."); *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231 (1959); *Holmberg v. Armbrecht,*

327 U.S. 392 (1946). Equitable tolling, like fraudulent concealment tolling (*Holmberg*) or estoppel tolling (*Glus*), turns on a case by case analysis of the facts in accordance with "considerations deeply rooted in our jurisprudence" (*American Pipe, supra,* 414 U.S. at 559) and does not cause any greater "confusion" or "uncertainty" regarding the statute of limitations.

Greyhound's first petition for certiorari requested this Court to give Mt. Hood's equitable tolling claim "full consideration." The Court saw "no justification" to do so then. 437 U.S. at 337 n. 21. There is no justification to do so now.

II. THE COURT OF APPEALS' DECISION DID NOT VIOLATE GREYHOUND'S CONSTITUTIONAL RIGHTS

Greyhound's demand for a jury trial of the equitable tolling issue comes late and with no support. The application of equitable tolling to prior court or agency proceedings has never been treated as a jury issue. In all of the tolling decisions cited by Mt. Hood and Greyhound, it was within "the authority of a federal court sitting as chancellor" to decide whether "to toll a statute of limitations on equitable grounds." This procedure was described by Chief Justice Burger "as a well established part of our jurisprudence." 437 U.S. at 338. There is good reason for this. First, equity issues are traditionally decided by the court, even within the context of a damage action.[15] Second, application of tolling here turned upon the resolution of

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[15]See *Ross v. Bernhart,* 396 U.S. 531, 538 (1970) ("The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."); *West v. Devitt,* 311 F.2d 787, 788 (8th Cir. 1963) (no right to jury trial of laches defense to damage claims); *Dawson v. Contractors Transport Corp.,* 467 F.2d 727, 733 (D.C. Cir. 1972) (no jury trial on equitable cross-claim for contribution in negligence action).

policy questions delineated in *Burnett, American Pipe* and *Johnson* which fall outside the jury's province.[16]

Moreover, Greyhound's demand for a jury trial with respect to equitable tolling was abandoned by Greyhound long ago. Greyhound previously requested the District Court, the Court of Appeals and this Court to reject Mt. Hood's equitable tolling claim—on the merits—without benefit of a jury. Now that equitable tolling has been applied by the Court, Greyhound wants a jury.

This Court should not grant certiorari to review contentions not pressed below. Greyhound's Fifth Amendment "due process" claim nowhere appears in the record below and its Seventh Amendment "jury trial" claim did not surface until long after this Court's prior remand. [R. 3376] Even then, it was given cursory five-line treatment in Greyhound's briefs to the lower courts. [R. 3376; Appellants' Opening brief, p. 18] No supporting authority was given. Now, in the hope that a "constitutional issue" might trigger certiorari, Greyhound's jury trial demand has belatedly assumed prominence in their latest petition. It is this pen-

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[16]Thus whether the "remedial scheme" (*Burnett, supra,* 380 U.S. at 427) reflected in § 16 of the Clayton Act and the Supreme Court doctrine of primary jurisdiction (particularly as it existed in 1964) required Mt. Hood to go to the ICC before commencing a court action for damages was a legal question which a jury could not be expected to decide. Likewise, whether the ICC action and the court action presented essentially the same issues regarding the same predatory conduct so as to charge Greyhound with constructive notice (if not actual notice) of Mt. Hood's antitrust claims was a legal question which a jury could not be expected to decide. Finally, whether tolling would be "consonant with the legislative scheme" (*American Pipe, supra,* 414 U.S. at 558) or whether there was "a substantial body of federal procedural law" and "a significant federal policy that would have conflicted with a decision not to suspend the statute" (*Johnson, supra,* 421 U.S. at 466) were policy questions which a jury could not be expected to decide.

chant for raising defenses in piecemeal fashion that has enabled Greyhound to enjoy its "day in court" many times over. Since 1964, Greyhound's behavior has been reviewed and condemned repeatedly by six federal tribunals (see footnote 1, *supra*), rendering further review by this Court superfluous.

III. THE INTEREST QUESTIONS RAISED BY GREYHOUND ARE NOT WORTHY OF CERTIORARI

A. The Court of Appeals Properly Awarded Interest from the Date of the Original Judgment

Following remand, the District Court allowed interest at Oregon's statutory rate of 6%[17] to accrue from the date of Mt. Hood's original judgment. Not content to have reaped the substantial benefit from the use of Mt. Hood's money for seven years at an interest rate far below prevailing levels, Greyhound asked the Court of Appeals to compound the injustice by depriving Mt. Hood of all interest on its judgment—including the portion unaffected by the ruling of this Court in the first appeal—from 1973 until 1979 when the third amended judgment was entered by the District Court. [R. 3570-71] Relying upon sound precedent,[18] the Court of Appeals rejected Greyhound's request that Mt. Hood be denied interest on its judgment. (App. A, pp. 23-5)

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[17]Oregon Revised Statutes 82.010.

[18]*Lew Wenzel & Co. v. London Litho Supply Co.*, 563 F.2d 1367, 1369 (9th Cir. 1977); *Perkins v. Standard Oil Co.*, 487 F.2d 672, 674-6 (9th Cir. 1973). The failure of this Court to specifically award interest did not preclude consideration of that issue by the lower courts. *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) ("our failure to make explicit mention in the mandate of attorney's fees simply left the matter open for consideration by the District Court, to which the mandate was directed."); *Kneeland v. American Loan and Trust Co.*, 138 U.S. 509, 511 (1891).

That holding is undeniably just and accords with a mass of authority.[19]

As the Court of Appeals recognized, the present judgment and the judgment previously vacated by this Court are "in the same amount for the same damages incurred during the same period. The only change is the rationale for tolling for a portion" of the judgment. (App. A p. 24) Hence the cases cited by Greyhound are readily distinguishable. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3538 (1980) and *Hysell v. Iowa Public Service Co.*, 559 F.2d 468 (8th Cir. 1977) both involved remand proceedings that required additional fact-finding and entry of *new* judgments. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 354 (1948) was concerned only with the power of appellate courts to interpret and enforce their mandates; it did not address the availability of interest on judgments altered on appeal.[20] The decision below creates no significant conflict in need of resolution by this Court.

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[19]*Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 845-847 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3556 (1979); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 429 (5th Cir. 1978); *City of Detroit v. Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1978); *Inland Credit Corp. v. M/T Bow Egret*, 556 F.2d 756, 758 (5th Cir. 1977); *Skou v. United States*, 526 F.2d 293, 300 (5th Cir. 1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 509 F.2d 784, 789 (5th Cir. 1975); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-877 (1st Cir. 1971); *Premier Corp. v. Serrano*, 471 F.Supp 444, 445-6 (S.D. Fla. 1979); *Feldman v. Allegheny Airlines, Inc.*, 452 F.Supp. 151, 153 (D.Conn. 1976); *Mascuilli v. United States*, 383 F.Supp. 50, 52-53 (E.D. Pa. 1974).

[20]Also, unlike the plaintiff in *Briggs*, Mt. Hood requested the Court of Appeals to modify its mandate on remand to expressly authorize the award of interest from the date of the original judgment and, unlike the Court of Appeals in *Briggs*, the court below ruled that such interest should be awarded. (Brief of Appellee, p. 58-9).

B. The Court of Appeals Properly Awarded Interest on Attorney's Fees

Greyhound's request for certiorari with respect to the lower court's award of interest on the entire judgment, including that portion of the judgment which consists of attorney's fees, should likewise be denied. Even if Greyhound's claims were otherwise deserving of this Court's review, it was apparently not worthy of Greyhound's attention on its prior appeals. The District Court's judgment dated December 21, 1973 expressly provided the award of attorney's fees would bear interest. [R. 3273] While Greyhound unsuccessfully appealed the amount of those fees, it did not question the lower court's award of interest thereon. To allow Greyhound to raise that question on its second appeal, having failed to do so on its first appeal six years ago, would reward Greyhound's efforts to prolong this litigation and would exacerbate the resultant injury to Mt. Hood.

Nor does Greyhound's contention have merit even if it had not been waived. The only authority cited in *Carpa, Inc. v. Ward Foods Inc.*, 567 F.2d 1316 (5th Cir. 1978) (upon which Greyhound relies) for its denial of interest on attorney's fees was an earlier diversity case applying Texas law, even though it recognized that accrual of interest in federal question cases is controlled by federal law. 567 F.2d at 1322. Section 1981 governs interest on "money judgments," not "costs" or "damages". The Court of Appeals was therefore correct in following *Perkins v. Standard Oil Company of California*, 487 F.2d 672, 675 (9th Cir. 1973) for, as it explained in *Perkins*, "once a judgment is obtained, interest thereon is mandatory with-

out regard to the elements of which that judgment is composed." This is the only reasonable construction of § 1981 of the Judicial Code and has therefore led many other courts to allow interest on awards of attorney's fees. E.g., *Lew Wenzel & Co., etc. v. London Litho Supply Co., Inc., supra,* 563 F.2d at 1369; *City of Detroit v. Grinnell Corp., supra,* 575 F.2d at 1010; *Ramey v. Cincinnati Enquirer, Inc.* 508 F.2d 1188, 1198 (6th Cir. 1974); *Harris v. Chicago Great Western Ry.*, 197 F.2d 829, 836 (7th Cir. 1952). *Carpa* is a mere aberration, contrary to the weight of authority on a trivial issue, and does not warrant a second writ of certiorari by this Court.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Dated: May 29, 1980.

Respectfully submitted,
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(Appendix follows)

STATUTES

Section 16 of the Clayton Act (15 U.S.C. § 26) provides:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing here contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Section 1961 of the Judicial Code (28 U.S.C. § 1961) provides:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."